1983

John Call and Clark Jenkins v. City of West Jordan : Appellant's Petition For Rehearing

IN THE SUPREME COURT OF THE STATE OF UTAH

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JOHN CALL AND
CLARK JENKINS,

Plaintiffs and Appellants,

vs.

CITY OF WEST JORDAN,

Defendant and Respondent.

No. 19186

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APPELLANTS' PETITION FOR REHEARING

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TABLE OF CONTENTS

	Page
POINT ONE:	
REHEARING IS NECESSARY BECAUSE THE COURT'S OPINION IS BASED UPON CONJECTURE AND SPECULATION OUTSIDE OF THE RECORD	2
A. THE COURT'S OPINION WAS BASED UPON A CORRECT LEGAL PRINCIPLE	2
B. THIS COURT ERRED IN APPLYING THE FACTS TO CORRECT LEGAL PRINCIPLES	3
POINT TWO:	
REHEARING IS NECESSARY AS SEVERAL IMPORTANT ISSUES REMAIN IN THE CASE	5
POINT THREE:	
REHEARING IS NECESSARY BECAUSE THE COURT HAS OVERLOOKED OVERWHELMING AUTHORITY ON THE ISSUE OF INDIVIDUAL DAMAGES	7
POINT FOUR:	
THE CASE SHOULD BE RETURNED TO THE TRIAL COURT FOR REPROCESSING BECAUSE THE TRIAL COURT FAILED TO MAKE ANY FINDING OF SUBSTANCE	8

TABLE OF CASES

	Page
Deposit Guarantee Natl. Bank v. Roper, 445 U.S. 326 (1980.....	6
Eisenberg v. Gagnon, 766 F.2d 770 (3rd Cir. 1985).....	9
Gibson v. Supercargoes & Checkers of Intl. Longshoremen's Union, 543 F.2d 1239 at n.2 (9th Cir. 1976).....	8
Gulf Oil v. Bernard, 452 U.S. 89, 68 L.Ed. 2d 693, 101 S. Ct. 2193 (1981).....	9
India v. United Air Lines, Inc., 83 F.R.D. 1, 12 at paragraph 20 (N.D. Cal. 1979).....	5,9
United States Parole Comm. v. Geraghty, 445 U.S. 388 (1980).....	6
Statutes and Rules:	
Utah Rules of Civil Procedure:	
Rule 23(a)(1).....	2
Rule 23(b)(1)(A).....	5
Other Authorities:	
Newberg on Class Actions, 2 Ed., §305 at p. 142.....	2
Notes on the Advisory Committee on Rules, 39 F.R.D. 100.....	5

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IN THE SUPREME COURT OF THE STATE OF UTAH

JOHN CALL AND CLARK JENKINS, Plaintiffs-Appellants, vs. CITY OF WEST JORDAN, Defendant-Respondent.	PETITION FOR REHEARING No. 19186

Appellant (Call) respectfully petitions this Court to rehear that portion of its opinion which refuses to certify this case as a class action. In support of this petition, appellant relies upon the points and authorities below.

POINT ONE

REHEARING IS NECESSARY
BECAUSE THE COURT'S OPINION IS BASED UPON
CONJECTURE AND SPECULATION OUTSIDE OF THE RECORD

The central issue on class certification was whether or not Rule 23(a)(1), Utah Rules of Civil Procedure, had been met.[1] This is often referred to as the numerosity requirement.

A. THE COURT'S OPINION WAS BASED UPON A CORRECT LEGAL PRINCIPLE.

During the briefing, Call argued that the size of the class was approximately one hundred members. Call further argued that classes of forty or more members would be presumed to satisfy Rule 23(a)(1).[2]

This Court ruled that a finding on Rule 23(a)(1) should not be based upon numbers alone. This Court ruled that the Court ought to look at other factors in deciding whether or not joinder is "impracticable." See Slip Opinion at p. 5 & 6.

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[1] "One or more members of a class may sue or be sued representative parties on behalf of all only if (1) the cl is so numerous that joinder of all members is impracticabl Rule 23(a)(1), Utah Rules of Civil Procedure.

[2] ". . .The difficulty inherent in joining as few as fo class members should raise a presumption that joinder impracticable, and the plaintiff whose class is that large larger should meet the test of Rule 23(a)(1) on that fa alone." Newberg on Class Actions, 2 Ed., §3.05 at p. 142.

Call concedes that this Court's legal analysis is correct. Newberg states the rule as follows:

> But numbers are only one of several considerations. Apart from class size, factors relevant to the joinder impracticability issue include judicial economy arising from the avoidance of a multiplicity of actions, geographic disbursement of class members, size of individual claims, financial resources of class members, the ability of claimants to institute individual suits, and requests for prospective injunctive relief which will involve future class members.
>
> Newberg on Class Actions, 2nd Ed., §3.06.

B. THIS COURT ERRED IN APPLYING THE FACTS TO CORRECT LEGAL PRINCIPLES.

After reaching a correct legal conclusion, this Court applied facts to the law. However, in so doing, this Court resorted to speculation and conjecture outside the record. Specifically, this Court speculated that the putative class members:

> . . .are developers engaged in business whose claims are not so insubstantial that joinder or individual suits would not merit the cost.

If true, that is of course a key fact which fits into the Court's legal analysis. However, there is no factual basis for that speculation. Certainly, Judge Dee did not make any such finding. The true facts are that:

A. Approximately 60% of the claims of putative class members are for less than $10,000.

B. Approximately 44% of the claims of putative class members are for less than $5,000.

C. Approximately 26% of the claims for putative class members are less than $2,500.

D. Approximately 8% of the claims of putative class members are for less than $1,000.

(R. 895-896.[3])

There is simply no factual basis to suppose that people with claims of $1,000 to $5,000 can afford the expense and risk of individual litigation. After all, this case has already consumed eight years risk of individual litigation and three Supreme Court opinions.

If this opinion is permitted to stand, it will mean that there can never be a class action in Utah unless the damages are less than $500 per person. That is simply not the law in any other jurisdiction (state or federal). Rather, the correct rule is as follows:

> It is important to note that though the existence of small claims may be a strong element in approving class actions, the presence of large claims is not a ground for class denial.
> Newberg on Class Actions, 2nd Ed., §4.39 at p. 363.

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[3]This is only a partial list of subdivisions. Compare R. 191-192.

POINT TWO
REHEARING IS NECESSARY AS SEVERAL IMPORTANT ISSUES REMAIN IN THE CASE

Call has urged that this case be certified under Rule 23(b)(1)(A), Utah Rules of Civil Procedure.[4] Indeed, Call has pointed out that Rule 23(b)(1)(A) was invented for this specific type of case:

> To illustrate: separate actions by individuals against a municipality to declare a bond issue invalid. . .to prevent or limit the making of a particular appropriation or to compel or to invalidate an assessment. . .
> Notes of the Advisory Committee on Rules, 39 F.R.D. 100.

This Court's opinion disposes of that argument as follows:

> Because of our ruling on the merits of the case, there is no possibility of inconsistent judgments and no issue of substantial public interest remains.[5]
> Slip Opinion, at p. 6.

---

[4] "The prosecution of separate actions by or against individual members of the class would create a risk of [i]nconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class."

[5] That is a dangerous rule which has apparently never been followed by any court in the U.S. This precendent would invite trial courts to always deny claims for class certification under Rule 23(b)(1)(A). The trial court would always be upheld on appeal because an appellate court could always say that there is no chance for inconsistent judgments after the ruling on the merits. In short, this opinion would emasculate Rule 23(b)(1)(A). For a case which so holds, see India v. United Air Lines, Inc., 83 F.R.D. 1, 12 at paragraph 20, (N.D. Cal. 1979).

However, the Court's opinion overlooks the fact that other important issues remain in the case.

For example, Call has prayed for injunctive relief. (R. 331-343, See Prayer at paragraphs 1(b), 2(b), 3(b), 4(b), 5(b), 6(b), and 7(b).) Although this Court has ruled on the merits, the case must now be returned to consider the shape of any injunctive relief. It is not likely that West Jordan will roll over and play dead on the injunction issue. Certainly, the shape of the injunction will have impact on all putative class members.

There is also an important statute of limitations issue left in the case. West Jordan is not ready to pay out claims to all comers. Rather, West Jordan has taken the position that the statute of limitations bars all other putative class members. (See Exhibit A.) Thus, the trial court must decide whether the statute of limitations has been tolled by reason of the class action.[6] That is obviously an issue that will have classwide applications.[7]

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[6]Because of the trial court's adverse rulings, West Jord has had no reason to raise the statute of limitations defe until now.

[7]It is true that West Jordan mades no statute limitations claim against Call. Or, in other words, statute of limitations issue is moot as to Call. However, is settled that Call may still litigate class issues that be moot as to him. See Deposit Guarantee Natl. Bank v. Ro 445 U.S. 326 (1980); and, United States Parole Comm. Geraghty, 445 U.S. 388 (1980). See also, Newberg on Cl Actions, 2nd Ed., §2.32 and §2.33.

Finally, there is an important issue remaining of a civil rights violation under 42 U.S.C. §1983. (See R. 338 at paragraphs 38-41.) Because of the adverse rulings of the lower court, that issue has been moot. However, the civil rights claim is now ripe for further proceedings in the trial court.

In summary, there are important issues remaining. Thus, is is too soon to discard the class device as unnecessary.

POINT THREE

REHEARING IS NECESSARY BECAUSE THE COURT HAS OVERLOOKED OVERWHELMING AUTHORITY ON THE ISSUE OF INDIVIDUALIZED DAMAGES

This Court has denied class certification, in part, because:

> Judicial economy would be little served because the amount of the claim of each class member would still need to be determined on an individual basis, regardless of class action status.
> Slip Opinion, at p. 6.

Virtually, no other court (state or federal) has adopted such a rule:

> Though at least some courts have suggested that differences in the amount of damages claimed will make a plaintiff's claim atypical, most courts have declined even to consider that argument, and nearly all of those that have ruled on it have rejected it outright. If differences in amounts of individual damages would make a class action improper, a class action for damages would never be possible, because variations in amount of damages among class members are inevitable unless they

> happen to be identically situated factually, which is not required under Rule 23. The existence of a class action provision for damage actions itself indicates that the drafters of the rule contemplated certifications for classes raising common liability issues, even where the amounts of damages claimed varied among class members.
>
> Newberg on Class Actions, 2nd Ed., §3.16.

See also, Appellant's Reply Brief, at p. 34 and 35.

If this opinion is permitted to stand, it will serve as an erroneous precedent for hundreds of other class actions now pending in the trial courts.

POINT FOUR

THE CASE SHOULD BE RETURNED TO THE TRIAL COURT FOR REPROCESSING BECAUSE THE TRIAL COURT FAILED TO MAKE ANY FINDING OF SUBSTANCE

This Court has observed that the correct standard of review is whether the trial court abused its discretion. (Slip Opinion, at p. 5.) However, how can this Court review the trial court's discretion when it doesn't know what the trial court had in mind? See Gibson v. Supercargoes & Checkers of Intl. Longshoremen's Union, 543 F.2d 1239 at n.2 (9th Cir. 1976). Moreover, the absence of adequate findings was an invitation for this Court to speculate on facts. (See Point One above.)

During the briefing, Call advised the Court of this defect in the record. See Appellant's Reply Brief, at p. 35, n.13. See also Gulf Oil v. Bernard, 452 U.S. 89, 68 L.Ed. 2d 693, 101 S. Ct. 2193 (1981); India v. United Air Lines, Inc., 565 F.2d 554, 562 (9th Cir. 1977); Eisenberg v. Gagnon, 766 F.2d 770 (3rd Cir. 1985).

In Eisenberg, supra, the appellate court refused to make its own findings on class issues:

> First, we find it difficult to evaluate, on a cold record, several of the remaining prerequisites to a 23(b)(3) class action, which the district court did not address. . .
>
> Second, class actions depend on the continuing supervision of the district court, including reconsideration of the efficacy of class action treatment as the circumstances change. One circumstance that has clearly changed is that Eisenberg & Nissen have won a judgment on the merits. [Emphasis added.]

See also, India v. United Airlines, supra, for a case where the appellate court remanded for the trial court to enter appropriate findings.

DATED this 5 day of Aug, 1986.

ROBERT J. DEBRY & ASSOCIATES
Attorneys for Plaintiffs-Appellants

By: _____
ROBERT J. DEBRY

W. Jordan assessing impact of ruling

Some confusion floating around decision that park fee ordinance is invalid

By Steve Fidel
Deseret News staff writer

WEST JORDAN — City officials are still assessing the impact of a Utah Supreme Court opinion Friday that declared a park development fee ordinance invalid.

Since 1975, the city has required developers to donate 7 percent of the land they plan to develop or 7 percent of the land value to the city for park development. Justice Richard C. Howe wrote the 4-1 decision declaring the West Jordan development law invalid because the city did not hold a proper public hearing before implementing the law.

City Manager Ron Olson said the fee was revised in 1981, and proper hearings were held then. The only issue the Supreme Court addressed, as he sees it, revolves around the $16,500 in fees that were collected before 1981. Whether the city will have to refund any of the fees collected will be decided by 3rd District Judge David B. Dee, Olson said.

The Utah Supreme Court has heard the West Jordan park fee issue four or five times. "This is the first time they have ruled against us. The first time, the constitutionality of the law was attacked, but it was upheld," Olson said.

Dee originally heard the case, brought by John Call and Clark Jenkins, developers of the Westcall subdivision at approximately 90th South and 40th West. Olson said he personally attended the proceedings in Dee's court but first learned of the Supreme Court ruling Saturday. He said the city is still evaluating the court opinion and no court dates have been set to consider whether any of the fees collected will have to be returned.

"It seems that our exposure would be limited to the Westcall subdivision. The fee as it stands today is in full compliance, as far as I know," Olson said.

A statute of limitations may limit fee refunds to Call and Jenkins. "I think there is a statute of limitations on filing a protest or a claim. The only ones that have done that are the Westcall people," Olson said. "Apparently the court denied a class action request."

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STATE OF UTAH)
: ss.
COUNTY OF SALT LAKE)

My name is Robert J. DeBry. I am attorney of record for appellants in this case. I hereby certify that the Petition for Rehearing was filed in good faith and not for purposes of delay.

DATED this 5 day of May, 1986.

ROBERT J. DEBRY & ASSOCIATES
Attorneys for Plaintiffs-Appellants

By: _____
ROBERT J. DEBRY

SUBSCRIBED AND SWORN to before me this 5 day of May, 1986.

BETTY JONES
NOTARY PUBLIC
STATE OF UTAH

_____
NOTARY PUBLIC
Residing at:

My commission expires:

3-5-90